No. 5708

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGIA CASUALTY COMPANY (a corporation),
Appellant,

vs.

LAURETT BOYD,
Appellee.

BRIEF FOR APPELLEE.

HARRY I. STAFFORD,
DEAN CUNHA,
Flood Building, San Francisco,
Attorneys for Appellee.

DANIEL R. SHOEMAKER,
Flood Building, San Francisco,
Of Counsel.

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No. 5708

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Georgia Casualty Company (a corporation), *Appellant*,	
vs.	
Laurett Boyd, *Appellee*.	

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

A restatement of the facts of this case is necessary for clarity and for the purposes of appellee's argument to this Court. The appellee, Laurett Boyd, recovered a judgment against Dr. George O. Jarvis on October 17th, 1927, based upon the negligence of Dr. Jarvis, in performing an operation upon appellee in November, 1925 (Tr. pp. 1-5, 18, 25-27). Thereafter, for the purpose of recovering the amount of the judgment, appellee brought this action against the appellant, Georgia Casualty Company, upon the policy of physicians' liability insurance, issued in May, 1925, by appellant to said Dr. George O. Jarvis. The action was brought under the terms of the California Statute (Stats. 1919, p. 776), which provides that a person who is injured by one that is insured, and who pro-

cures a judgment against the insured for the injury, may sue the insurance carrier of the insured directly, upon the policy, to recover the amount of the judgment.

The case was tried by the District Court, a jury having been waived by written stipulation of the parties and filed with the Court (Tr. p. 14). No request for special findings of fact or special conclusions of law having been made, the Court on October 10th, 1928, made its general finding in favor of appellee and ordered judgment in accordance therewith (Tr. p. 48).

The appellant in the District Court, opposed appellee's claim upon the sole ground that Dr. Jarvis had made a false statement in his application for said policy. That said false statement was a breach of warranty, or a misrepresentation, or concealment of a fact material to the contract, thereby avoiding the policy and entitling the company to rescind the policy in toto and as to all persons.

The appellant for the purpose of rescission, sent a notice of rescission of the policy, on which the appellee's action is brought, to Dr. Jarvis, the insured, and also, returned therewith, the amount of the premium. Said notice was dated August 26th, 1926. The appellant never sent any notice of rescission to appellee, either as to herself, or to Dr. Jarvis, nor did appellant attempt in any manner, or by any means, to effect that rescission as to appellee other than by the notice of rescission sent to Dr. Jarvis (Tr. p. 35). This notice of rescission was not sent until after the negligent operation.

APPELLEE'S CONTENTIONS.

The appellee contends:

1. That in view of the condition of the record, the only action this Honorable Court can take is to affirm the judgment of the District Court.

2. That under the California statute (Stats. 1919, p. 776), every contract of indemnity insurance now written in the state of California is a tri-party agreement; that the rights of the injured person under said policy of insurance accrue at the time of the accident or injury and that the liability of the company to the insured person cannot be affected by any subsequent action taken as between the insurer and the insured.

3. That under the aforementioned statute, defenses that the insurer may have against the insured cannot be asserted against the injured person.

I.

THE CONDITION OF THE RECORD IN THIS CASE REQUIRES AN AFFIRMANCE OF THE JUDGMENT.

The appellant states that its sole ground of opposition to appellee's claim is the asserted breach of the policy by Dr. Jarvis and its subsequent purported rescission based thereon; or as appellee views it, appellant is contending that the appellee stands in the same position as the insured in reference to the policy of insurance and appellant may assert all defenses against the appellee that it could assert against the insured were he to bring an action on the policy;

and if the defense is not made out that appellee is entitled to judgment.

It goes without question, that regardless of whether or not a rescission by the insurer directed to insured would be a good defense to an action on the policy by the injured person, the rescission and the facts warranting the same must first be proved, otherwise the appellee is entitled to recover *(Pigg v. International Indemnity Co.,* 86 Cal. App. 671).

In view of the general finding of the trial Court for the appellee, we consider that it must follow that upon the evidence the trial Court did not feel that appellant had proved the right to rescind or the rescission.

The answer of the appellant to this statement is to be noted in its brief—where the evidence is recited and the claim made that the testimony is without conflict and shows that appellant had the right to rescind the policy and that the policy was rescinded.

We not only dispute that statement but we earnestly urge that appellant is precluded from having the matter reviewed by this Court; that the review of this Court in the present instance can only extend to an examination of the pleadings and the rulings of the Court during the progress of the trial.

Our contention is based upon the following facts and authorities:

The case was tried and submitted to the District Court for decision without any request from appellant for special findings of fact or special conclusions of law, nor was a request made for a general finding in

favor of defendant. Appellant made a motion for a nonsuit at close of appellee's case and at the close of the testimony both appellee and appellant made a motion for judgment and the cause was submitted (Tr. p. 48); thereafter, the District Court made its general finding in favor of appellee and ordered judgment thereon.

The effect of the failure to request findings and its subsequent limitation of the review that may be had in this Court has been expounded in many cases.

In the case of *Dunsmuir v. Scott* (C. C. A. 9) 217 Fed. 200, 202, this Court stated:

> "Under the provisions of Act March 3, 1865, 13 Stat. 501, Rev. St., Secs. 649, 700 (U. S. Comp. St. 1913, Secs. 1587, 1668), the rule is well settled that if a jury trial is waived, and a general finding is made by the court, review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions, and that the bill of exceptions cannot be used to bring up the oral testimony for review."

The rule is also set forth in the case of *Northern Idaho and Montana Power Company v. A. L. Jordan Lumber Co.*, (C. C. A. 9) 262 Fed. 765, 766.

> "On the trial no exceptions were taken to any ruling of the Court, and no request was made for special findings, or for a finding in favor of the defendant in the action. The plaintiff in error refers to the opinion of the Court below as containing special findings of fact, but the opinion cannot be resorted to for that purpose.
>
> "In the absence of a special finding, the judgment must be affirmed, unless the complaint fails to state a cause of action, or the bill of exceptions

presents some erroneous ruling of the Court in the progress of the trial. There being in the present case no ruling of the trial court, and no special finding of fact, but only a general finding, the latter must be accepted as conclusive, and this court can go no further than to affirm the judgment."

To the same effect:

Newlands v. Calaveras Min. & Mill. Co., (C. C. A. 9) 28 F. (2nd) 89;

Fleischmann Const. Co. v. United States, 270 U. S. 349; 46 S. Ct. 384, 70 L. Ed. 624;

Oyler v. Cleveland etc. Co., (C. C. A. 6) 16 F. (2nd) 455;

Law v. United States, 266 U. S. 494, 45 S. Ct. 175, 69 L. Ed. 401;

Societe Nouvelle d'Armement v. Barnaby, (C. C. A. 9) 246 Fed. 68.

The appellant has included in the record presented to this Court the opinion of the trial Judge (Tr. p. 14). It has been repeatedly held that such an opinion is no part of the record on appeal; and that such an opinion is not a special finding of facts within the meaning of the statute.

Northern Idaho and Montana Power Co. v. A. L. Jordan Lumber Co. (supra);

Fleischmann Const. Co. v. United States (supra).

The question of the sufficiency of the evidence cannot be reviewed by this Court because appellant failed to preserve its point by appropriate action in the trial Court. Appellant as has been shown, failed to

request any findings; appellant at the close of appellee's evidence did make a motion for a nonsuit which was denied and an exception duly noted (Tr. p. 32) but appellant thereafter continued with its case and introduced evidence in its behalf and did not thereafter challenge appellee's evidence in any manner. Having failed to do this, it has been held the point is lost on appeal.

> *Alaska Fishermen's Packing Co. v. Chin Quong*, (C. C. A. 9) 202 Fed. 707;
>
> *Modoc County Bank v. Ringling*, (C. C. A. 9) 7 F. (2nd) 535;
>
> *American Film Co. v. Reilly*, 278 F. 147.

The appellant's motion for judgment at the termination of the taking of the testimony availed it nothing and does not present any question for review.

The case of *Denver Livestock Commission Co. et al. v. Lee, et al.*, 20 F. (2nd) 531, holds that a mere motion for judgment before close of the trial and exception to its denial, is insufficient to save for review the question of sufficiency of the evidence to sustain general finding by court for adverse party. If the question is to be saved, the motion must be specific.

The appellee's view of the rule to be applied in the present situation is most aptly demonstrated by the case of *People's Bank v. International Finance Corporation* (C. C. A. 4), 30 F. (2nd) 46, which states:

> "The first question which arises on this record is the extent of our power to review the decision of the court below. It is well settled that in a law case we have no power to review the evidence or to reverse findings of fact on the ground that

they are not supported by the weight thereof. Where the question is properly raised, we do have the power to pass upon the question as to whether there is any substantial evidence to support the verdict or findings, for this is a question of law; but, for such question to be passed upon here, it must have been raised properly in the court below. As stated, that was not done in this case. The fact that a jury trial was waived does not affect the matter; for in such case, if defendant wishes to challenge generally the sufficiency of the evidence, he should move for a finding in his favor on the ground of its insufficiency, and should note an exception to the refusal of the motion, just as though the trial were had before a jury. Allen v. New York, P. & N. R. Co. (C. C. A. 4th) 15 F. (2nd) 532. If it is thought that certain facts essential to the case of the opposition have not been established by sufficient evidence, it is necessary, not merely to request special findings but to except specifically to any findings objected to. Where the findings are not thus excepted to, and the sufficiency of the evidence to support them is not challenged, in the court below, assignments of error based on the insufficiency of the testimony present nothing for us to review. Fleischmann Const. Co. v. U. S. 270 U. S. 349, 46 S. Ct. 284, 70 L. Ed. 624; Gillespie v. Hongkong & Shanghai Banking Corporation (C. C. A. 9th) 23 F. (2nd) 670; Lahman v. Burnes Nat. Bank (C. C. A. 8th) 20 F. (2nd) 897; Humphreys v. Third Nat. Bank (C. C. A. 6th) 75 F. 852.

The rule stated by Judge Taft in the case last cited and quoted with approval in the Fleischmann case, supra, is as follows:

'He should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the

facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits.'

Although we cannot, in the absence of proper exceptions, review the sufficiency of the evidence to sustain the findings, we can, where the judge makes special findings, review the sufficiency of the findings to sustain the judgment. R. S. Sec. 700; 28 U. S. C. A. Sec. 875."

II.

THE RESCISSION IS INEFFECTIVE AS TO THE APPELLEE.

We will discuss this part of the case on the assumption that the facts are as the appellee represents them to be, namely, that Dr. Jarvis had issued to him a policy of insurance by the appellant. That he thereafter negligently performed an operation on appellee. That after this negligent operation, but before the appellee sued Dr. Jarvis, or the appellant, the appellant rescinded the contract of insurance, (although we must state that whether the rescission was made before suit was commenced against Dr. Jarvis, is not definitely established). That thereafter, appellee recovered her judgment against Dr. Jarvis and then commenced this suit against appellant.

On the foregoing statement of facts, we claim that under the California statute (Stats. 1919, p. 776), this contract of insurance is a tri-party contract. That the rights of the appellee under said policy of insurance accrued at the time of the injury (November, 1925), and that the rights of the company to the insured

person, cannot be affected by any subsequent action taken as between the insurer and the insured.

Every policy of indemnity insurance written in the State of California, since the passage of the statute (Stats. 1919, p. 776), is a tri-party contract.

> *Malmgren v. The Southwestern Accident Insurance Co.,* 201 Cal. 29, 33, 34,

wherein it is stated:

> "* * * The provisions of the statutes, are, as a proposition of law, a part of every policy of indemnity issued by a company or corporation engaged in transacting the kind of indemnity insurance business which appellant was authorized by the law of the state to transact. It was a contractual relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy. * * *
>
> * * * The statute is founded upon principles of public policy and an anomalous situation would be created if the rights of third parties, for whose protection the law was adopted, could be hindered, delayed, or defeated by the private agreements of two of the parties to a tri-party contract. * * *"

See:

> *Pigg v. International Indemnity Company, supra.*

The appellee in her action against appellant was proceeding on a contract right (cases heretofore cited).

The rights of the injured person under said policy accrue at the time of the accident or injury and the liability of the company to said injured person cannot

be affected by any subsequent action taken as between the insurer and the insured.

> *Malmgren v. The Southwestern Accident Insurance Co.*, 201 Cal. 29 (supra);
>
> *Finkelberg v. Continental Cas. Co.*, 126 Wash. 543; 219 Pac. 12;
>
> *Slavens v. Standard Accident Ins. Co.*, (C. C. A. 9) 27 F. (2d) 859;
>
> *Metropolitan Casualty Ins. Co. v. Albritton*, 214 Ky. 16, 282 S. W. 187.

In the *Finkelberg* case (cited with approval in *Stusser v. Mutual Union Insurance Co.* (1923) 127 Wash. 449, 221 Pac. 331, and *Slavens v. Standard Accident Ins. Co.* supra) it is stated:

> "We are satisfied that the appellant (the injured person) has a right to maintain this action against the respondent, (insurance company) * * * and that this right accrued at the time of the accident."

In view of the authorities we have cited and the familiar rule that a third person, beneficially interested in a contract may maintain an action to recover thereon, even though the identity of the third person may not be known at the time of the execution of the contract; the rescission in this case was ineffective for any purpose and the defendant is bound by its contract with the plaintiff.

III.

APPELLEE'S RIGHT TO JUDGMENT AGAINST APPELLANT IS ABSOLUTE.

The appellee is proceeding in this action upon the contract right conferred upon her by statute, and under said statute it is our contention that the appellant is not entitled to raise this defense; that this statute in the interests of public policy vitiates any such defense on the part of the insurer.

Let us first look to the reasons for this enactment of this statute and the intent of the legislature that lies behind it. It is a matter of common knowledge that for many years prior to the enactment of this statute it was the policy of certain unscrupulous insurance companies whose insured had judgments recovered against them for injuries to supply said persons with an attorney; put them through bankruptcy and give them a sum of money in order to avoid responding to these judgments. It was one of the tricks of the business, however, an aroused public demanded relief from such tactics and the present statute was enacted to curb any such activity on the part of any insurance company.

We say that this statute deprives the insurance company of the defense it is attempting to set up; not only in express terms but also by virtue of the intent that is behind it, for of what practical benefit would this statute be if the insured and the insurer could get together and cancel or rescind the policy and thereby leave the injured person without any recourse; such cannot be nor is it the effect of the statute for

the insured and the insurer would be doing the very thing the statute strikes at.

The opinion of the Supreme Court of the State of California in regard to this statute, as expressed in the case of *Malmgren v. Southwestern Accident Insurance Co.,* 201 Cal. 29, at pages 33 and 34, is most apt:

> "The substantive law of this state cannot be enlarged, circumvented, defeated, or modified by any provision which the insurer may have elected to place in its contract in derogation of or in conflict therewith. The statute is founded upon principles of public policy and an anomalous situation would be created if the rights of third parties, for whose protection the law was adopted, could be hindered, delayed, or defeated by the private agreements of two of the parties to a tri-party contract. If appellant's contention be sound, then it could, with equal justification, require the question of the assured's bankruptcy to be adjudicated by a competent tribunal before it would be obliged to recognize his insolvency or bankruptcy, or impose other conditions precedent to the injured person's right of action in derogation of express provisions of the law's mandate. We see no merit in the contention. Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796 (197 N. Y. Supp. 606), relied upon as an authority in the instant case, is merely declaratory of the New York statute, which provides that a cause of action does not accrue to the injured person until an execution issued upon the judgment against the assured has been returned unsatisfied by reason of insolvency or bankruptcy. No such language or language equivalent thereto is found in the statute of this state and neither appellant nor this court is given authority to interpolate the provision of the New York law into a California statute. The clause in the statute which provides that an 'action may be brought

> against the company, on the policy and subject to its terms and limitations, by such injured person' was not intended to defeat its purpose upon the theory that an action brought 'on the policy' binds the injured person to a repudiation or waiver of the benefits of the statute expressly adopted for his protection, but it clearly has reference to those matters concerning which the insurer and assured could legally contract."

The recent case of *Kruger v. California Highway Indemnity Exchange,* 201 Cal. 672, contains a great deal of reasoning and thought that applies to the situation before us. The Court, in that case, deals with a jitney bus ordinance of the City and County of San Francisco. The opinion establishes that there can be no question of the constitutionality of such statutes (pp. 177 and 178).

Now, this ordinance is the enactment of the local legislator in response to the public demand for protection in its special phase even as Statutes 1919, page 776, is the enactment of the state legislators to govern a larger class of the same sort of cases.

The reasoning and interpretation given the ordinance applies as well to the state statute. The points we urge here in relation to the state statute and which were decided and held to be the proper construction and interpretation of the local ordinance, are matters of first impression in so far as the state statute is concerned.

The statute provides:

> "No policy of insurance against loss or damage resulting from accident to, or injury suffered by

> another person and for which the person injured is liable * * * shall be issued or delivered to any person in this State by any domestic or foreign insurance company, authorized to do business in this State, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy and stating that *in case judgment shall be secured against the insured* in an action brought by the injured party or his etc., then an *action may be brought against the company on the policy and subject to its terms and limitations, by such injured persons etc., to recover on said judgment.*"

In order that we may be clear upon this construction of the statute we will state that the clause "and subject to its terms and limitations" can only be taken in one way, namely: that the recovery thereon is to be limited to the figures that the policy provides and that the insurance cover the risk in question, for example, a judgment of $10,000 and a policy of insurance for $5,000, the recovery is limited to the $5,000, but given a judgment and a policy of insurance, indemnifying against the liability on which the judgment is recovered, and there is nothing to stop the judgment holder's right to recovery, but the provisions of the statute which require insolvency or bankruptcy on the part of the insured.

We have shown in this brief under our discussion of the rescission phase that under this statute and the policies of insurance written thereunder that the liability of the insurer to the injured person becomes

fixed at the time of the injury. The liability is fixed even though suit to enforce that liability cannot be commenced until after judgment against the insured and his insolvency or bankruptcy. The insurer by writing insurance under this statute, undertakes to pay such judgment in case these conditions occur and the suit is brought, as the statute states, *to recover on said judgment.*

We cannot see any distinction between the liability assumed by the insurer in the *Kruger* case, from that assumed under the state statute by the insurer in this case.

We must give the statute a construction that makes it virile and effective, not one that emaciates it and makes it a dead letter and subject to the machinations of unscrupulous parties.

The appellant contends, of course, that this statute under which appellee proceeds, saves to the insurer all defenses that it could urge against the insured.

As we have shown, there is no definite expression on this question by the California Courts.

We do not agree with appellant in what may be deduced from the case of *Bryson v. International Indemnity Co.*, 55 C. A. D. 87; the only question decided there was that unless the policy covers the risk, the insurer cannot be held by an injured person, and the insurer may show that it had not assumed liability in certain situations. That is an entirely different proposition from a suit by an injured person against an insurer on a policy which covered the insured under those circumstances in which the person was injured.

It is not our contention that merely because a person is insured, his insurer must answer for all his misdeeds. The injured person must show he was one of the class the policy included.

And of course, in the *Pigg v. International Indemnity Co.* case (supra) the Court did not have to consider the question at all inasmuch as the evidence did not establish the proposition the insurer was urging as a defense.

We are convinced that in view of the *Malmgren* case and the reasoning therein, when coupled with the *Finkelberg* case, which carries that reasoning to its logical conclusion that there can be no doubt as to the course California will adopt when the question is squarely presented to its Courts.

CONCLUSION.

We have considered this case in the light of appellant's claims, from which it follows, that the appellee is entitled to recover unless the appellant proved that it was entitled to rescind the policy and that it did rescind the policy before any action was commenced thereon.

We have directed this Court's attention to the fact that this matter is before it upon a general finding for appellee and have contended that it necessarily follows that the trial Court must have found against the establishment of the facts of this defense and that even though appellant claims this is contrary to and against the weight of the evidence, still appellant by

failing to take appropriate action in the trial Court cannot bring the testimony to this Court for review.

We submit that the review of this Court is limited by the condition of the record, to an examination of the pleadings and the rulings of the trial Court on the admission and exclusion of evidence and that in view of the fact that the *prima facie* case of appellee has, in so far as this Court is concerned, remained undisturbed, the judgment of the District Court should be affirmed.

Though to our mind, in no way required, we have discussed the case upon its merits and in the light most favorable to appellant, and we consider that this Court agrees with the conclusions heretofore arrived at by other Appellate Courts that the subsequent actions between the insurer and the insured in regard to a policy of insurance cannot affect the rights of third parties theretofore accrued therein.

We submit that the California statute is to be given an interpretation in accord with the purposes sought to be accomplished thereby and that the judgment of the District Court be affirmed.

Dated, San Francisco,
June 17, 1929.

Respectfully submitted,

HARRY I. STAFFORD,
DEAN CUNHA,
Attorneys for Appellee.

DANIEL R. SHOEMAKER,
Of Counsel.